Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1997

SAM KEIRSEY and KAY ORNDORFF,
*Petitioner,*

vs.

DREW DIAMOND, BOBBY BUSBY, CAROLYN KUSLER, CHARLES JACKSON, and THE CITY OF TULSA, OKLAHOMA, a municipal corporation,
*Respondents.*

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the 10th Circuit Court of Appeals erred in upholding the U.S. District Courts' granting of summary judgment to the Individual Appellees by determining that the Appellants failed to come forward with evidence of sufficient particularity demonstrating that the Individual Appellees' conduct violated clearly established law.

2. Whether the 10th Circuit Court of Appeals failed to follow Supreme Court precedent in determining that the Individual Appellees are protected by the doctrine of qualified immunity.

3. Whether the 10th Circuit Court of Appeals failed to follow Supreme Court precedent in determining that the Police Chief is not the final policy maker for the City of Tulsa, Oklahoma for purposes of 42 U.S.C. § 1983.

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The order of the Court of Appeals is reproduced in the Appendix filed herewith. (See Order of the 10th Circuit Court of Appeals, Appendix, Exhibit "A"). The unreported opinion of the U.S. District Court granting Summary Judgment to the individual Appellees is reproduced in the Appendix filed herewith. (See Order of the U.S. District Court, Appendix, Exhibit "B"). The unreported opinion of the U.S. District Court granting Summary Judgment to the city of Tulsa, Oklahoma is also reproduced in the Appendix filed herewith. (See Order of the U.S. District Court, Appendix, Exhibit "C").

## STATEMENT OF JURISDICTION

The order sought to be reviewed by this Court was entered by the Court of Appeals for the 10th Circuit on April 29, 1998.

This Court has jurisdiction to review the order of the Court of Appeals on Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

## STATUTES AND ORDINANCES INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

28 U.S.C. § 1254(1):

Cases in the Courts of Appeals may be reviewed by the Supreme Court by the following methods: (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

28 U.S.C. § 1331:

The district courts shall have original jurisdiction of all civil actions arising under the constitution, laws or treaties of the United States.

28 U.S.C. § 1343(a)(1)-(3):

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (1) to recover damages for injury to his person or property, or because of deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;...(3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

42 U.S.C. § 1983:

Every person who, under color of any statute ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

29 Tulsa Revised Ordinances § 101:
Control of Department

The Department shall be under the control and authority of the Mayor who shall approve rules and regulations defining the authority, specifying the duties, and governing the conduct of all police officers and employees of the Department.

29 Tulsa Revised Ordinances § 106:
Powers of Chief

The Chief of Police shall have general supervision of the Department and shall be accountable to the Mayor for the promulgation of all orders or regulations made or given to the Department. Every member of the Police Department shall respect and obey all orders issued by the chief. It shall be the duty of the chief to confer fully with and be advised by the Mayor on all important matters pertaining to the government of the Department.

Article X § 8.1 of the Tulsa Revised Charter:
Suspension, Removal, and Demotion

All officers and employees in the classified service shall hold their respective positions regardless of changes of City officials or City administrations and shall be suspended without pay, demoted, or removed only for good and sufficient cause.

Article X § 8.2 of the Tulsa Revised Charter: Notice

Persons in the classified service who are suspended without pay, removed, or demoted shall be notified in writing of the specific cause thereof within five (5) days following such action. A copy of such statement of cause shall be filed with the Personnel Director. Within ten (10) days from the receipt of such notice, the person affected may file a written request with the Personnel Director for a hearing before the Civil Service Commission. The Civil Service Commission shall hold a public hearing within thirty (30) days after the filing of the request. If such person shall fail to request a hearing before the Civil Service Commission as provided herein, the suspension without pay, removal, or demotion shall be final.

Article X § 8.3 of the Tulsa Revised Charter: Hearing

Not less than four (4) members of the Civil Service Commission shall be required to hold a hearing on a suspension, removal, or demotion. A vote of three (3) members shall be required for a decision. The City Attorney shall present the charges upon which the suspension, removal, or demotion is based. The Civil Service Commission shall rule upon the question of admissibility of evidence, competency of witnesses,

and any other question of law. The employee may be represented by counsel or another person. The hearing shall be informal and shall be conducted in accord with the rules of evidence generally followed before administrative tribunals and without formal or technical adherence to those rules which prevail in a court of law. The burden of proof shall be upon the appointing authority whose action is the subject of the hearing. No suspension, removal, or demotion shall be affirmed unless sustained by a preponderance of the evidence.

Article X § 8.4 of the Tulsa Revised Charter: Action

If after the hearing before the Civil Service Commission the employee is found to be suspended, removed, or demoted without adequate cause, the position of the employee shall be restored without loss of pay. If the Civil Service Commission shall find cause, it may approve or modify the action taken by the appointing authority; provided, any right of appeal to the courts shall not be abrogated. The Civil Service Commission shall make written decisions with findings of fact.

## STATEMENT OF THE CASE

### Material Facts

Plaintiffs/Appellants, Sam Keirsey and Kay Orndorff

[hereinafter "Appellants"] were, at the time of the Tulsa Police Department's retaliatory actions against them, employees of the City of Tulsa, Oklahoma, [hereinafter referred to as "City"], as regular, full-time police officers.

During 1991 and 1992, and while employed by the City as police officers, the Appellants became aware of certain wrongdoing, improprieties, and possible crimes committed or condoned by other members of the Tulsa Police Department.

The Appellants communicated to their superiors, within the Tulsa Police Department, information concerning the misconduct and improprieties.

The Appellants submit that the City obtained property through drug forfeiture laws to be used for the support of an Equestrian Ranch for the City of Tulsa's mounted patrol division of the Tulsa Police Department. Appellant Keirsey, after working in the Headquarters Division of the Tulsa Police Department for several months, was given the responsibility of overseeing grants for the police department in January and February of 1990. Keirsey's responsibilities included making sure that the grant monies were spent in accordance with the grant requirements.

The Appellees dispute the fact that the Appellants disclosed, to their superiors, certain improprieties. The Appellants did communicate to their supervisor, Appellee Carolyn Kusler [hereinafter "Kusler"], the statement that Jack Sherl [hereinafter "Sherl"] made concerning his son playing on the Youth Ranch baseball team and the scholarship received by his son for playing on that team. In response to the above information, Appellee Chief of Police Drew Diamond [hereinafter "Diamond" or "Police Chief"] told Kusler that he did not think that the fact that Sherl's son was

playing on the Youth Ranch team was a violation of the grant, but if Sherl was coaching the Webster team, "then that would be different".

Additionally, Appellant Orndorff conducted the inventory of the Youth Ranch equipment in order to assume her responsibilities involving the Youth Ranch. Specifically, in 1991, Kusler directed the Appellants to begin getting a handle on the Youth Ranch to prepare for their new responsibilities. The Appellees dispute this claiming that Orndorff conducted the inventory in order to "take over" the Youth Ranch. Appellant Orndorff did conduct an inventory on August 9, 1991, however, it did not include the sports equipment, as the Appellees claim.

As to the Youth Ranch operations, the Appellees submit that during 1991, Tulsa City Councilor Dewey Bartlett began expressing concerns about the operations and programs at the Youth Ranch. These exhibits show that there was only a request for information on D.A.R.E. funds and the Youth Ranch financial statement. As further proof that only a request was made on the part of the Appellees, Appellant Orndorff told Councilman Bartlett on August 27, 1991, that she understood that he wanted to know some things about the D.A.R.E. program and the Youth Ranch and that she was there to tell him whatever he wanted to know, if she had knowledge of the requested information.

Furthermore, the Appellants assert that a Major Jackson contacted Appellant Keirsey to enlist cooperation in keeping Appellant Orndorff quiet about things that she knew about the Youth Ranch and because Jackson and Kusler were concerned that Orndorff's statement would show that Jackson and Kusler had lied in their statements to Councilman Bartlett and to see if Orndorff was "programmable". The Appellees

deny this was the true reason for Jackson initiating contact with Keirsey.

The Appellants attended a meeting in the Mayor's office on September 16, 1991. This meeting was prematurely adjourned and continued in the Tulsa County District Attorney's Office. Contrary to what the Appellees claim, the reason the meeting was prematurely adjourned was because the Assistant City Attorney, Charles Fisher, stated that the City had not read these officers their *Miranda* Rights. Fisher's statement clearly indicated to Officers Keirsey and Orndorff that they were being labeled as suspects. In addition, the Appellees allege that the District Attorney began his investigation on a date certain. However, the evidence simply does not state a date upon which the District Attorney began his investigation. Appellants submit that there had been in effect for some time a direct order that Tulsa Police Department personnel could not give media releases and/or interviews without approval. Consequently, Keirsey circulated a Memorandum to his subordinates that media release and/or interviews could not be given without approval from Major Kusler or Chief Diamond. In contrast, the Appellees allege that Chief Diamond had advised the Appellants that he had no restrictions on any police officer doing interviews with the media.

Additionally, Appellant Keirsey had been ordered not to investigate the matters in question, but rather to provide information to the District Attorney's investigators. Consequently, Keirsey gathered information from Roy Heim, as well as Lieutenant Merchant and numerous other people. Appellant Keirsey also assisted in the preparation of a document that the District Attorney's office would use in the Grand Jury proceedings. The evidence shows that Appellants orders to "fully cooperate" with the District Attorney's office

were for the purpose of giving testimony and were not for the purpose of being involved with the investigation, even if asked to do so by the District Attorney, unless Kusler approved the involvement. Furthermore, Appellants submit that their orders to fully cooperate with the District Attorney's office was merely an illusory gesture on the part of the Appellees in view of the fact that the Appellees actions toward the Appellants indicated that the Appellants were not to cooperate and because the Appellants had been instructed that they were not to become involved with the investigation without approval from Kusler, even if asked to do so by the District Attorney.

The Appellants have endured and suffered harassment and a variety of punitive actions from their superiors and co-workers for the simple reason that the Appellants exposed certain wrongs being practiced by specific individuals in the Tulsa Police Department. The Appellants were "whistle blowers" and as such, they suffered the consequences. For example, after being assigned to work directly for Major Bob Chance, (Chief Drew Diamond's best friend), Appellant Keirsey received the lowest performance evaluation in his fifteen year tenure as Lieutenant. Keirsey's superiors were directed to give him extra work to keep him too busy to report wrongdoing. Additionally, Keirsey was assigned the midnight shift as watch commander. Chief Palmer (current Chief of Tulsa Police) informed Keirsey that the assignment was not for punishment purposes, but that he (Palmer) was the Chief of Police and, therefore, he could assign Keirsey to any position he desired. Appellee Kusler attempted to implicate and investigate both Appellants for wrongful conduct that Kusler alleged Appellants had committed in the District Attorney's investigation of the Youth Ranch. Appellant Orndorff's June 1, 1993, evaluation was lower than evaluations in the past and it was handled by Lt. Jim Green, an

employee under whom Orndorff has never worked. In addition, the review committee of Appellee Kusler's pre-action hearing found that Kusler's continued pattern of untruthfulness "was of such a nature that it was calculated to cause embarrassment to two subordinates if discovered". Further evidence of the harassment suffered by the Appellants is demonstrated by Appellants transfer from Tulsa Police Headquarters to the City of Tulsa's Mayor's office.

## Procedural Background

The original action was brought by Appellants on April 27, 1992, in the U.S. District Court for the Northern District of Oklahoma pursuant to 42 U.S.C. § 1983. Subject matter jurisdiction in this action was proper pursuant to 28 U.S.C. § 1331 and § 1343(a)(1)-(3) and supplemental jurisdiction was proper pursuant to 28 U.S.C. § 1367(a). The Appellants allege that as Tulsa Police Officers they were subjected to retaliation from their supervisors for reporting wrongdoings at the Tulsa Police Department's Youth Ranch. On Order of the U.S. District Court for the Northern District of Oklahoma filed December 13, 1995, the individual Appellees' Motion for Summary Judgment was granted and all individual Appellees were dismissed. In that Order, the U.S. District Court denied the first Motion for Summary Judgment filed by the City of Tulsa, Oklahoma. The Court granted the City leave to file a second Motion for Summary Judgment which was done on January 16, 1996. On May 29, 1996, following a hearing, an Order was issued by the U.S. District Court granting the Motion for Summary Judgment for the City and disposing of the action.

Appellants timely perfected their appeal of the U.S. District Court's granting of Summary Judgment for the Appellees. On April 29, 1998, the 10th Circuit Court of

Appeals affirmed , holding that the Appellants did not provide evidence of sufficient particularity to defeat the individual Appellees' claim of qualified immunity. The Court of Appeals also affirmed the U.S. District Court as to the City, holding that the Police Chief was not the final policy maker for the City. (See Appendix, Exhibit "1", *supra*).

## I.

## ARGUMENT AND AUTHORITIES

### A. SUMMARY JUDGMENT IS INAPPROPRIATE WHERE A GENUINE QUESTION OF MATERIAL FACT REMAINS

Rule 56 of the *Federal Rules of Civil Procedure* provides, in part, that judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law.

Summary judgment is appropriate only where there is no substantial controversy as to any material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Further, "[s]ummary judgment will not lie if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* When a case is brought on summary judgment, "[t]he evidence of [appellants] is to be believed, and all justifiable inferences are to be drawn in their favor." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992). "The party opposing the motion for summary judgment bears the burden of responding *only after* the

moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." (Emphasis in original). *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Further, "at the summary judgment stage the judge's function is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

In the case at bar, the Appellants have met their Rule 56(c) burden by showing that factual elements charged in the Appellees' Motion for Summary Judgment are present and disputed. Therefore, as indicated by the following arguments, summary judgment in the instant case is inappropriate and the Court of Appeals' affirmance of the trial courts' grant of summary judgment in favor of all appellees must be reversed and the cause remanded to the trial court for further proceeding.

## B. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FAILED TO FOLLOW SUPREME COURT PRECEDENT IN DETERMINING THAT THE INDIVIDUAL APPELLEES ARE PROTECTED BY THE DOCTRINE OF QUALIFIED IMMUNITY

The Individual Appellees in this cause are attempting to place themselves within the qualified (or good faith) immunity doctrine. This doctrine is used to shield public officials from undue interference with their duties and from potentially disabling threats of liability. *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982).

This Court has stated that it does not "assure that

congress intended to incorporate every common-law immunity into § 1983 in unaltered form" but rather looks at immunity for public officials in the common law. *Malley v. Briggs*, 475 U.S. 335, 339 (1986).

### 1. Summary Judgment Is Inappropriate In A Qualified Immunity Case Where A Genuine Issue Of Material Fact Remains Concerning The Appellee's Conduct

When the defense of qualified immunity has been raised by the Defendant, the Plaintiff has the burden to show, with particularity, facts and law establishing the inference that the Defendants have violated a constitutional right. *Walter v. Morton*, 33 F.3d 1240, 1242 (10th Cir. 1994). "Once the Plaintiff has sufficiently alleged the conduct violated clearly established law, then the Defendant bears the burden, as movant for summary judgment, of showing no material issues of fact remain that would defeat the claim of qualified immunity." *Id.* at 1242.

The defense of qualified immunity is meant to focus on the "objective legal reasonableness of an official's acts". *Harlow*, 457 U.S. at 819. "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Id.* at 819. Further, if the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Id.* at 818-19. Therefore, a public official who knows or should know that he is acting outside the law should be held liable. *Butz v. Economou*, 438 U.S. 478 (1978).

This Court has held that "[i]t is clearly established that a state may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, 483 U.S. 378, 383 (1987). To determine whether an employee's First Amendment right of free speech has been infringed by a governmental employer, the court must ascertain whether the speech was on a matter of public concern. *Connick v. Meyers*, 461 U.S. 138, 146 (1983).

In *Pickering v. Board of Education*, this Court held that the expenditure of public funds was a matter of public concern. *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563, 568 (1967). In *Pickering*, a letter was written by a teacher to an editor of a newspaper attacking the School Board's allocation of funds between the school's educational and athletic programs. *Id.* This Court held that,

> the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administrator, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question, free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allocated to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

*Id.* at 570.

Moreover, the 10th Circuit Court of Appeals has held that "[w]hen the content of speech focuses on disclosing public officials' malfeasance or wrongdoing, it is likely to be considered a matter of public concern." *Schalk v. Gallemore*, 906 F. 2d 491, 495 (10th Cir. 1990).

### 2. A Genuine Issue Of Material Fact Remains Concerning The Individual Appellees' Conduct

In this case, as in *Pickering*, the Appellants' speech regarding the professional misconduct of the Appellees was protected under the First Amendment and their disclosures were a matter of public concern. Specifically, the Appellants informed their superiors that Jack Sherl was coaching a team that included, not only his son, but that the team had included no underprivileged youths as mandated by the grant. The coaching was on Tulsa Police Department time and the equipment and uniforms were purchased by grant money or donated funds. Each of these matters constituted a violation of the use of the grant money. The Appellants also informed their superiors that Jack Sherl would not supply a list of the Youth Ranch team's players or inventory. In addition, the Appellants informed their superiors that the funds had been solicited and accepted by the Tulsa Police on behalf of the Youth Ranch.

As in *Pickering*, the Appellants have raised sufficient inferences that they were retaliated against for their disclosures. Specifically, the following indicate sufficient inferences of retaliation based on the Appellants' disclosures: (1) Kusler filed a sexual harassment complaint against Keirsey; (2) Kusler altered a tape recording regarding a

meeting with Keirsey and Orndorff; (3) Charles Jackson attempted to have Keirsey and Orndorff lie to Dewey Bartlett at a meeting; (4) Kusler made demands on Keirsey and Orndorff that had never been made before; (5) Diamond directed Appellant Orndorff to forget all that happened; (6) Diamond, Busby and Kusler intimidated Keirsey and Orndorff with regard to giving information to the Tulsa County District Attorney's Office; (7) Mayor Pro Temp Susan Savage tried to dissuade Keirsey's and Orndorff's meeting with City Councilman Dewey Bartlett; (8) Diamond attempted to transfer Keirsey and Orndorff; (9) Diamond threatened that Keirsey and Orndorff would be "dealt with"; (10) Kusler lied to the Tulsa World regarding Keirsey; and (11) Keirsey and Orndorff received significantly lower performance evaluations following their disclosures.

Due to the preceding, the Individual Appellees are not protected by the doctrine of qualified immunity and it was inappropriate for the U.S. District Court to grant the Individual Appellees summary judgment.

## C. THIS COURT SHOULD GRANT A WRIT OF CERTIORARI BECAUSE THE COURT OF APPEALS FAILED TO FOLLOW SUPREME COURT PRECEDENT IN DETERMINING THAT THE POLICE CHIEF IS NOT THE FINAL POLICY MAKER FOR THE CITY FOR PURPOSES OF § 1983

In *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), the Supreme Court held that municipalities can be sued as "persons" under 42 U.S.C. § 1983. However, the Court held that municipalities cannot be held liable under § 1983 on a respondeat superior theory for merely employing a tortfeasor. *Monell*, 436 U.S. at 691. Rather, municipalities are subject to liability only for their

official policies or customs. This Court held,

> it is when execution of a government's policy or custom, whether made by its lawmakers or by **those whose edicts or acts may fairly be said to represent official policy**, inflicts the injury that the government as an entity is responsible under Sec. 1983. (Emphasis added).

*Id.* at 694.

The Court in *Monell* distinguished between municipal **policy** and municipal **custom**. It described municipal policy as a "policy statement, ordinance, regulation, or decision officially adopted and promulgated by [a municipality's] officers" and municipal custom as "persistent and widespread...practices of...officials." *Id.* at 690-91.

Since *Monell*, the Supreme Court has explained that a municipality can be liable under §1983 for the acts of a municipal official only when the official possesses "final policy making authority" to establish municipal policy with respect to the acts in question. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) (plurality); *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988) (plurality). The Court in *Pembaur* and *Praprotnik* emphasized that municipal liability is limited to "acts that are, properly speaking, acts 'of the municipality'—that is, acts which the municipality has officially sanctioned or ordered." *Pembaur*, 475 U.S. at 480; *see also Praprotnik*, 485 U.S. at 124.

The mere exercise of discretion by a government official is not sufficient, by itself, to generate municipal

liability:

> The fact that a particular official—even a policy making official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. [Citation omitted.] The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable.

*Pembaur*, 475 U.S. at 481-83. However, if the power to make final policy in an area of the government's business has been delegated to a government official, then the official's acts in that area are the acts of the government. *Pembaur*, 475 U.S. at 482-83; *Praprotnik*, 485 U.S. at 124. Therefore, according to these cases, if the Plaintiff can show that the unconstitutional acts were taken by the "final policy making official" for the City, then these acts are considered to be the acts of the City. If this can be shown, the Plaintiff need not prove that this type of act is a "custom" for this City government; the fact that this one act occurred, and that it came from the final policy makers for the government on that issue, is sufficient to establish liability under § 1983. The acts of a lower level functionary may not be the acts of the City (and the City is not liable under respondeat superior). However, the acts of the final policy maker in the City are equivalent to the acts of the City and the City would therefore be liable.

The question for our case is this: Has the Chief of Police been delegated the power to make "final policy" as that term has been construed? It may be true that the Police Chief's authority may be over-ridden by the Mayor or City

Commission, if they chose to do so in an individual case. However, the 10th Circuit Court of Appeals has held that this "right to overrule" does not mean that the Chief is not the "final policy maker" regarding employment decisions within the police department. The Chief can be overruled, but he still sets policy. *Flanagan v. Munger*, 890 F.d. 1557 (10th Cir. 1989).

In *Flanagan*, some police officers were reprimanded by the police chief because of their part ownership in a video rental store. The police officers brought suit against the City, alleging violation of their first amendment rights. *Id.* The City defended, claiming that the Police Chief's actions were not the actions of the City. *Id.* In *Flanagan* it was pointed out, like the City in the case at bar, the Police Chief's employment decisions could be over-ridden by the City Manager and the City Council. The City charter gave the City Manager the right to supervise the activities of the Police Chief and to set aside any actions taken by the Police Chief. *Id.* Further, the rules of the Civil Service Commission governed disciplinary actions against police officers. *Id.*

The Police Chief clearly was not the "last word" on employment decisions in *Flanagan*. However, despite this, the Court determined that he was, for all intents and purposes, the final policy maker for employment decisions, under the meaning of the *Monell* case. The *Flanagan* Court held:

> In our judgment, when chief Munger issued the reprimands against Plaintiffs, he acted as the official "responsible for establishing final policy with respect to the subject matter in question." *Pembaur*, 475 U.S. at 483-84, 106 S.Ct. at 1300. Therefore, Chief Munger's unconstitutional reprimand may be imputed to

> the City for purposes of municipal liability. We reverse the trial court's grant of summary judgment to the City on this issue, grant summary judgment to Plaintiffs, and remand to the trial court for a determination of remedies on their free speech claim against the City and, to the extent they seek injunction relief, against Chief Munger as well.

*Id.* at 1569.

In the case at bar, as in *Flanagan*, the Police Chief was given "direct management and supervision" over the Department, and was "responsible for the discipline, good order and proper conduct of the Department." *Id.* at 1568-69. In the instant case, the Police Chief was given "general supervision of the Department" by Title 29, Tulsa Revised Ordinances, § 106 of the City Code, and every police officer has the duty to "respect and obey all orders issued by the Chief." In *Flanagan*, the City Manager had "general management and supervision of all matters relating to the police department, its subordinate officers and employees." *Flanagan*, 890 F.d. at 1568. Similarly, in the instant case, the Mayor has "control and authority" over the Department, and the right to approve rules that govern "the conduct of all police officers and employees of the Department." (Title 29, Tulsa Revised Ordinances, § 101). In *Flanagan*, the City argues that the Civil Service Commission governed disciplinary matters; similarly, in the case at bar, the City makes the same argument.

In short, *Flanagan* holds that a Police Chief, given "general supervision" over the Police Department (even though his supervision can be overruled by the Mayor), is to be considered the "final policy maker" under the *Monell* test.

The 10th Circuit Court of Appeals recently cited *Flanagan* by stating,

> Nevertheless, our decisions also underscore that any review procedure or constraints must be meaningful–as opposed to merely hypothetical–in order to strip an official of "final policy making" authority. See *Melton*, 879 F.d. at 724 n. 24 (although not explicitly addressing its significance, charter provision that all personnel decisions were to be made solely based upon "merit and fitness" did not immunize City from liability based upon City Manager's personnel decision); ***Flanagan v. Munger*, 890 F.d. 1557, 1569 (10th Cir. 1989) ("[F]or all intents and purposes the Chief's discipline decisions are final, and any meaningful administrative review [by the City Council or City Manager] is illusory.")** *Starrett v. Wadley*, 876 F.d. 808, 818-19 (10th Cir. 1989) ("Wadley had final authority to set employment policy as to the hiring and firing of his staff" because City did not offer any "meaningful avenues of review"). (Emphasis added).

*Randle v. City of Aurora*, 69 F.3d 441, 449 (10th Cir. 1995). Appellant requests that this Court consider *Flanagan*, due to the 10th Circuit Court of Appeals' reliance on *Monell*, *Pembaur*, and *Paprotnik* in forming its opinion.

Further, Chief of Police, Drew Diamond, testified in his deposition that he had general supervisory control over the police assignments within the Department:

> Q. So you would have ultimately been the one responsible for assigning Jackie Sherl under his

brother?

A. I'm responsible for assigning every officer on the police department while I was police chief.

The *Monell* case does not require that the absolute ultimate head of the organization be the person directly issuing the order for a City to be liable for a constitutional violation; rather, *Monell* merely requires that the act be done "by those whose edicts or acts may fairly be said to represent official policy" before § 1983 liability be imposed on a City for the acts of one of its employees. *Monell*, 436 U.S. at 694. Chief Diamond speaks for the Department. Certainly, the Mayor and the City Council may have the ultimate power to overrule his policy, but unless and until it is overruled, his acts are the City's acts and the City remains liable. This is not the imposition of respondeat superior liability; this is the imposition of liability arising out of the direct acts of the City itself, embodied in its Chief of Police. That is the logic of *Monnel* and it was recognized in *Flanagan*.

In the case at bar, the Appellants have made allegations that Police Chief Drew Diamond took certain actions that impinged on the Appellants' free speech rights. Many of these actions did not even relate to reassignment of the Appellants, but rather related simply to their intimidation and harassment by the Chief. The City has not shown that these were issues that could have been appealed to the Civil Service Commission, even if that constitutes a "meaningful review" under *Flanagan*. The Appellant also asserts that certain acts alleged herein were directly caused by the Mayor, such as Mayor Pro Temp Susan Savage attempting to dissuade Keirsey's and Orndorff's meeting with City Councilman Dewey Bartlett.

The Appellee City has not shown that it is entitled to the defense set out in *Monell*. The Appellants were harassed

and intimidated in an attempt to squelch their First Amendment rights by the most powerful people within the police department.

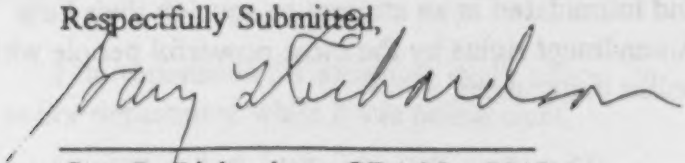
Therefore, the acts of the Police Chief should have been considered to be those of the final policy maker and the U.S. District Court should not have granted Appellee, City of Tulsa, Oklahoma, summary judgment.

## CONCLUSION

Appellants assert that the 10th Circuit Court of Appeals failed to follow Supreme Court precedent in upholding the U.S. District Courts granting of summary judgment to the Appellees by determining that the Appellants failed to come forward with evidence of sufficient particularity demonstrating that the Appellees' conduct violated clearly established law and by determining that the Appellants failed to raise a genuine issue of material fact concerning the conduct of Appellees raising the defense of qualified immunity. Appellants also assert that the 10th Circuit Court of Appeals failed to follow Supreme Court precedent in upholding the U.S. District Courts determination that the Police Chief is not the final policy maker for the City of Tulsa, Oklahoma for purposes of 42 U.S.C. § 1983.

WHEREFORE, Appellants pray this Most Honorable Court will accept this Petition for Writ of Certiorari.

Respectfully Submitted,



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**APPENDIX EXHIBIT "A" - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED APRIL 29, 1998**

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 96-5155

SAM KEIRSEY AND KAY ORNDORFF,
Plaintiff-Counter Defendant-Appellant,

v.

DREW DIAMOND, BOBBY BUSBY,
and CHARLES JACKSON,
Defendants-Appellees,

CAROLYN KUSLER,
Defendant-Counter Claimant-Appellee,

CITY OF TULSA,
Defendant-Cross Claim Defendant-Appellee.

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Appeal from the United States District Court
for the Northern District of Oklahoma
(D.C. No. 92-C-345-H)

Tulsa Police Officers Sam Keirsey and Kay Orndorff brought this action under 42 U.S.C. § 1983 against the City of Tulsa, former Tulsa Police Chief Drew Diamond, and Tulsa Police Officers Carolyn Kusler, Charles Jackson, and Bobby Busby. Plaintiffs assert their First Amendment rights were violated when defendants retaliated against them for speaking out about alleged improprieties in the Police Department's operation of the Tulsa

Youth Ranch. The district court concluded that the individual defendants were entitled to summary judgment because plaintiffs' allegations were conclusory and nonspecific. The court also entered summary judgment for the City of Tulsa, holding that none of the alleged improper conduct was taken by City policy-makers. Plaintiffs appeal and we affirm.

The events leading up to this suit began when responsibility for the operation of the Youth Ranch was transferred from a uniformed division to the Tulsa Police headquarters. Defendant Jackson was responsible for the Ranch before the transfer, and defendant Kusler, who was division commander at headquarters, was responsible after the change. Plaintiff Orndorff was assigned to meet with the outgoing personnel to prepare for a smooth transition. The Ranch had received a federal grant to fund sports programs for under privileged children, and Plaintiff Keirsey was in charge of overseeing grant operations. Both plaintiffs reported to Defendant Kusler.

During the transition, plaintiffs received information which led them to believe that Ranch funds and equipment had been misappropriated and/or stolen, and that other improper activities had taken place there. Plaintiffs reported their suspicions to Kusler. Meetings were held, a City Councilor began to ask questions about the situation, and ultimately the District Attorney began an investigation. Plaintiffs were directed by the Mayor's office to cooperate with the investigation and they did so, telling the District Attorney's office all they knew and had heard about improprieties that had allegedly taken place at the Ranch.

Plaintiffs brought this suit alleging that as a result of their cooperation and the information they gave during the investigation, defendants subjected them to harassment, intimidation, and retaliation. "It is now axiomatic that a governmental entity cannot condition employment 'on a basis

that infringes the employee's constitutionally protected interest in freedom of expression.'" Schalk v. Gallemore, 906 F.d. 491, 494 (10th Cir 1990) (quoting Connick v. Myers, 461 U.S. 138, 142 (1983)). By the time the events at issue here took place, we had rejected the position that "only adverse employment decisions, such as termination, suspension, or transfer, in retaliation for constitutionally protected conduct are illegal," holding instead that "[a]ctions short of an actual or constructive employment decision can in certain circumstances violate the First Amendment." Morfin v. Albuquerque Pub. Schs., 906 F.d. 1434, 1437 n.3 (10th Cir. 1990) (emphasis added). We expressly did not delineate a precise standard in Morfin, see id., and we have not had an occasion to do so in subsequent cases. Nonetheless, the cases we cited in Morfin demonstrate that the actions complained of must be sufficiently substantial to present an actual or potential danger that an employee's speech will be chilled. See e.g., Pieczynski v. Duffy, 875 F.d. 1331, 1333 (7th Cir. 1989) (harassment not constitutional violation when so trivial "a person of ordinary firmness would not be deterred" from engaging in protected activity); Allen v. Scribner, 812 F.d. 426, 434 n.17 (9th Cir. 1987) (harassment not constitutional violation when court can say as matter of law that exercise of First Amendment rights not deterred).

When a defendant asserts the defense of qualified immunity, the plaintiff must come forward with evidence of sufficient particularity demonstrating that the defendant's conduct violated clearly established law. Langley v. Adams County, 987 F.d. 1473, 1476 (10th Cir. 1993). "Although we view the evidence and draw all inferences in the light most favorable to the party opposing summary judgment, that party 'must identify sufficient evidence which would require submission of the case to a jury.'" Id. (quoting Mares v. ConAgra Poultry Co., 971 F.d. 492, 494 (10th Cir. 1992)). "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is

competent to testify to the matters therein." Fed. R. Civ. P. 56(e).

Plaintiffs' failure to comply with the above requirements for opposing a grant of a grant of summary judgment seriously impedes our ability to address their claims on the merits. We have repeatedly cautioned that

> the nonmovant must do more than refer to allegations of counsel contained in a brief to withstand summary judgment. Rather, sufficient evidence (pertinent to the material issue) must be identified by reference to an affidavit, a deposition transcript or a specific exhibit incorporated therein. In the absence of such specific reference, we will not search the record in an effort to determine whether there exists dormant evidence which might require submission of the case to a jury. Such an appellate supplementation of the nonmovant's presentation would not be fair to either the movant or the district court.

Thomas v. Wichita Coca-Cola Bottling Co, 968 F.d. 1022, 1024-25 (10th Cir 1992) (citations omitted). Moreover, "[i]t is well settled in this circuit that we can consider only admissible evidence in reviewing an order granting summary judgment. Hearsay testimony cannot be considered because '[a] third party's description of [a witness'] supposed testimony is not suitable grist for the summary judgment mill.'" Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1541 (10th Cir. 1995) (citations omitted). As we discuss briefly below, plaintiffs here have frequently failed to support their arguments with any record citations whatsoever, and many of the citations they do provide are to hearsay evidence that we will not consider.

We first address plaintiffs' claims against the individual defendants. Plaintiffs concede that they have never received a

cut in pay, or been demoted or suspended. They both nevertheless argue that they were given undesirable transfers and less favorable performance reviews in retaliation for their protected activity. Specifically, Keirsey complains about his reassignment by Chief Palmer to the midnight shift under Major Bob Chance and his subsequent lower performance evaluation. Orndorff apparently complains about her transfer by Chief Dave Bean and her June 1, 1993 evaluation by Lieutenant Jim Green. Significantly, however, the persons responsible for the transfers and the reviews are not named defendants in this lawsuit. Plaintiffs have offered nothing but hearsay and speculation to establish the retaliatory nature of these actions or to tie them to defendants. Accordingly, these claims do not defeat the grant of summary judgment.

Plaintiffs also assert the following laundry list of incidents which they contend constitute actionable harassment under Morfin.

1. Kusler filed a sexual harassment complaint against Keirsey;
2. Kusler altered a tape recording regarding a meeting with Keirsey and Orndorff;
3. Charles Jackson attempted to have Keirsey and Orndorff lie to [a city councilman] at a meeting;
4. Kusler made demands on Keirsey and Orndorff that had never been made before (i.e. reporting everything to her);
5. Diamond directed Plaintiff Orndorff to forget all that happened;
6. Diamond, Busby and Kusler intimidated Keirsey and Orndorff in regard to giving information to the Tulsa County District Attorney's Office;
7. Mayor Pro Temp Susan Savage tried to dissuade Keirsey's and Orndorff's meeting with [the city councilman];
8. Busby made threats against Keirsey and Orndorff;

9. Diamond attempted to transfer Keirsey and Orndorff;

10. Diamond threatened that Keirsey and Orndorff would be "dealt with";

11. Kusler lied to the Tulsa World [newspaper] regarding Keirsey;

12. Plaintiffs' lowered performance evaluations.

Aplts. App. at 72.[1]

Many of the above items cannot be characterized as harassment, many are unsupported, and others are supported by nothing more than hearsay. Indeed, the list as it appears in district court pleadings is unaccompanied by any citations to the record whatsoever. Moreover, even if the allegations were properly accompanied by admissible evidence, it is undisputed that the conduct did not chill the exercise of plaintiffs' speech. See Deguiseppe v. Village of Bellwood, 68 F.3d 187, 191 (7th Cir. 1995) ("the complained-of action must be sufficiently adverse to present an actual or potential danger that the speech of employees will be chilled"). Accordingly, in view of our discussion in Morfin indicating that harassment alone does not rise to a constitutional violation unless it presents a substantial danger of chilling protected speech, individual defendants were entitled to summary judgment.

Plaintiffs also sued the City of Tulsa, asserting that it is liable for the unconstitutional acts of former Police Chief

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[1] As to item number one, the record reflects that Officer Kusler filed her complaint against another officer, not plaintiff Keirsey. Her complaint against Keirsey was that he did not properly process the complaint, which other with authority determined was not actionable. As to item number eight, plaintiffs conceded in district court that they had no evidence to support the allegation.

Diamond. Having failed to establish their claim against defendant Diamond individually through admissible evidence, plaintiffs claim against the City based on the same conduct fails as well. See Hinton v. City of Elwood, 997 F.d. 774, 782 (10th Cir. 1993).

Moreover, we agree with the district court that the City is not liable because the Police Chief is not the final policy-maker for the City. The Tulsa Municipal Ordinances provide that the Police Department "shall be under the control and authority, specifying the duties, and governing the conduct of all police officers and employees of the Department." Tulsa Okla., Municipal Ordinances tit. 29, sec. 101. The Ordinances further provide that the Chief is accountable to the Mayor for the promulgation of all orders given to the Department, and requires the Chief to confer with and be advised by the Mayor on al important matters pertaining to the Department. Id. sec. 106.[2] This case is thus distinguishable from Flanagan v. Munger, 809 F.d. 1557 (10th Cir. 1989), upon which plaintiffs rely, because there the City conceded that the Chief had final authority to take the actions complained of and the pertinent municipal code in fact vested final authority in the Chief. Id. at 1568.

We **AFFIRM** the grant of summary judgment against all defendants.

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[2] In addition to relying on the conduct of former Chief Diamond to support their claim against the City, plaintiffs also assert that the City is liable on the basis of Mayor Pro Tem Susan Savage's alleged attempt to dissuade them from meeting with the city councilman. This alleged conduct cannot be characterized as harassment, is unsupported by any citation to admissible evidence, and is too trivial to rise to a constitutional violation in any event.

ENTERED FOR THE COURT

Stephanie K. Seymour
Chief Judge

**APPENDIX EXHIBIT "B" - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DATED DECEMBER 13, 1995**

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 92-C-345-H

SAM KEIRSEY AND KAY ORNDORFF,
Plaintiff-Counter Defendant-Appellant,

v.

DREW DIAMOND, BOBBY BUSBY,
and CHARLES JACKSON,
Defendants-Appellees,

CAROLYN KUSLER,
Defendant-Counter Claimant-Appellee,

CITY OF TULSA,
Defendant-Cross Claim Defendant-Appellee.

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**ORDER**

This matter comes before the court on Defendants' Motion for Summary Judgement (Docket #109). A hearing on this matter was held before the Court on November 22, 1995.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986),

cert. Denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56 (c). In Celotex, the Supreme Curt stated:

> {t}he plain language of Rule 56 (c) mandates the entry of summary judgement, after
>
> > adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56 (e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment") (emphasis in original). "Factual disputes that are irrelevant or unnecessary will not be counted."

Id. At 248.

Summary judgment is only appropriate if "there is {not} sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. At 250. The Supreme Court stated:

> {t}he mere existence of a scintilla of evidence in support of the plaintiff's positionwill be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. At 252. Thus, to defeat a summary judgment motion, the

nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.") (citations omitted).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250.

If, as in the instant case, a court looks outside the pleadings, the motion to dismiss should be converted to a motion for summary judgment, in which case a court views the evidence submitted in the light most favorable to the nonmoving party. Celotex, 477 U.S. at 324; Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

I.

Defendants Drew Diamond, Bobby Busby, Carolyn Kusler, and Charles Jackson move for summary judgment on the basis of qualified immunity. The Tenth Circuit has noted that, in the qualified immunity context, "the reasons for swiftly terminating insubstantial lawsuits are particularly strong." Pueblo Neighborhood Health Ctrs. v. Losavio, 847 F.2d 642, 649 (10th Cir. 1988) (quoting Martin v. District of Columbia Police Dep't, 812 F. 2d 1425, 1434 (D.C. Cir. 1987)). Therefore, the moving party "has no burden to disprove unsupported claims of his opponent." Id. (citing Celotex, 477 U.S. at 324; Anderson, 477 U.S. at 247-50). "{P}laintiffs cannot rely on conclusory allegations; they must produce some specific factual support for their claim of unconstitutional motive." Id.

The Supreme Court and the Tenth Circuit have recognized the competing interests implicated by a qualified immunity defense, stating in applicable part as follows:

> In a attempt to balance the need to preserve an avenue for vindication of constitutional rights with the desire to shield public officials from undue interference in the claims, the Court {has} adopted an objective test to determine whether the doctrine of qualified immunity applies.

Pueblo Neighborhood, 847 F.2d at 645 (citing Harlow v. Fitzgerald, 457 U.S. 800 (1982)). Thus, government officials performing discretionary functions will not be held liable for their conduct unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known. " Harlow, 457 U.S. at 818. Qualified immunity therefore shields government officials from liability for mistakes insofar as the mistakes are reasonable. Hunter v. Bryant, 112 S.Ct. 534, 536 (1987).

Once a defendant raises the affirmative defense of qualified immunity, the plaintiff must "come forward with facts or allegations sufficient to show both that the defendant's alleged conduct violated the law and that the law was clearly established when the alleged violation occurred." Pueblo Neighborhood, 847 F.2d at 646. If the court concludes that the law was not clearly established at the time of the defendant's action, the defendant is entitled to qualified immunity. Harlow, 457 U.S. at 818.

If the plaintiff sufficiently identifies both a clearly established right and the defendant's conduct that violated that right, then the defendant assumes the normal burden of a movant for summary judgment of establishing that no material facts remain in dispute that would defeat her or his claim of qualified immunity. Pueblo Neighborhood, 847 F.2d at 646. Thus, unless

the plaintiff is able to make the required showing that the defendant's conduct violated a clearly established right, the government official is properly spared the burden and expenses of defending the litigation.

The "plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant has violated it." Pueblo Neighborhood, 847 F.2d at 645 (citing Creighton, 483 U.S. at 640 n.2). The Supreme Court has cautioned that allowing a plaintiff to overcome a qualified immunity defense by asserting a violation of a broad constitutional right would render the qualified immunity defense unavailable as a practical matter. Therefore, "the contours of the right {that has allegedly been violated} must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Creighton, 483 U.S. at 640.

In Pueblo Neighborhood, the Tenth Circuit held that where, as in the instant case, an official's state of mind is an essential element of the plaintiff's claims, the plaintiff cannot succeed unless he produces "specific factual support for {his} claim of unconstitutional motive." 847 F.2d at 649. Recognizing the Supreme Court's "strong condemnation of insubstantial suits against government officials," the Tenth Circuit resolved to hold plaintiffs to a higher standard when public officials move for summary judgment on the basis of qualified immunity. Id. The court held that

> {w}here the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the official's actions were improperly motivated. ... {Moreover}, plaintiffs should not be allowed to overcome a properly submitted

> motion for summary judgment based on qualified immunity grounds without more than conclusory and nonspecific allegations.

Id. At 649-650 (emphasis added).

In the resent case, Plaintiffs contend that Defendants took adverse employment actions against them in retaliation for Plaintiffs' roles in investigating alleged improper activities within the Tulsa Police Department. Thus, Defendants' subjective intent is an essential element of Plaintiffs' claim.

Based upon a review of the record and arguments of counsel, the Court finds that Plaintiffs' allegations of retaliatory adverse employment actions are conclusory and nonspecific, and thus insufficient to preclude Defendants' properly submitted summary judgment motion. The individual defendants are therefore entitled to qualified immunity and their motion for summary judgment is hereby granted.

II.

Defendant City of Tulsa also moves for summary judgment. However, the authorities cited in the defendants' joint brief do not obtain as to the city. As municipalities are ineligible for qualified immunity, see Owen v. City of Independence, 445 U.S. 622 (1980), Defendant City of Tulsa must articulate a sufficient alternative legal basis for granting summary judgment in its favor. Because Defendant has failed to do so, the Court denies its present motion for summary judgment. The Court, however, grants Defendant City of Tulsa leave to file a new motion for summary judgement, if such motion is filed by January 16, 1996.

In conclusion, the Motion for Summary Judgment by Defendant City of Tulsa is hereby denied (Docket #109). The Motion for Summary Judgment by Defendants Diamond, Busby, Kusler, and Jackson is hereby granted (Docket #`109).

IT IS SO ORDERED.

This _____ Day of December, 1995.

Sven Erik Holmes
United States District Judge

**APPENDIX EXHIBIT "C" - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA DATED MAY 28, 1996**

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 92-C-345-H

SAM KEIRSEY AND KAY ORNDORFF,
Plaintiff-Counter Defendant-Appellant,

v.

DREW DIAMOND, BOBBY BUSBY,
and CHARLES JACKSON,
Defendants-Appellees,

CAROLYN KUSLER,
Defendant-Counter Claimant-Appellee,

CITY OF TULSA,
Defendant-Cross Claim Defendant-Appellee.

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## ORDER

This matter comes before the Court on a Motion for Summary Judgment filed by the City of Tulsa ("City") (Docket #172) and Plaintiffs' Motion for Summary Judgment on the Counterclaims of Defendant Kusler (Docket #181).

Plaintiff are officers in the City of Tulsa Police Department. They brought this action pursuant to 42 U.S.C. § 1983 alleging that they were subjected to retaliation from their supervisors when they reported alleged wrongdoings at the police department's Youth Ranch. Defendant Kusler counterclaimed asserting libel, slander,

and intentional interference with contract claims against both Plaintiffs. In an Order entered on December 14,1 995, the Court granted summary judgment in favor of the individual defendants in this action. The City and the Plaintiffs then filed these motions for summary judgment.

I.

Summary judgment is appropriate where "there is no genuine issue as to any material fact,"Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Windon Third Oil & Gas Drilling Partnership v. Federal Deposit Ins. Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. Denied, 480 U.S. 947 (1987), and"the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

> [t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment."). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. At 248.

Summary judgment is only appropriate if"there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. At 250. The Supreme Court

stated:

> [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. At 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." (Citations omitted)).

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250.

II.

The City asserts that Plaintiffs have failed to establish a basis for municipal liability under Section 1983. The Supreme Court has held that the doctrine of respondent superior does not apply to Section 1983 claims. Monell v. Department of Social Servs., 436 U.S. 658 (1978). Thus, a municipality is liable under Section 1983 only where the plaintiff establishes that the municipality itself was responsible for the alleged deprivation of constitutional rights.

The Supreme Court has recognized three bases for municipal liability under Section 1983. First, a local government may be liable where the alleged deprivation stems from "a policy statement, ordinance, regulation, or decision officially adopted and

promulgated by that body's officers." Moneil, 436 U.S. at 690. Second, a municipality may be liable under Section 1983 for a decision by a governmental decision maker who "possesses final authority to establish municipal policy with respect to the action ordered." Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986). Finally, a municipality may be liable "for the actions of an employee who is not a final policymaking authority if a widespread practice exists to the end that there is a 'custom or usage with the force of law'" Sauers v. Salt Lake County, 1 F.3d. 1122, 1129 (10th Cir. 1996); see St. Louis v. Praprotnik, 475 U.S. 469 (1986). The sole basis of liability asserted by Plaintiffs is that the allegedly unconstitutional actions were taken pursuant to the orders of a final policymaker for the City, Police Chief Drew Diamond.

The "final policymaker" determination is a question of state law. Pembaur, 475 U.S. at 483. The Tenth Circuit has recently recognized three elements that assist in determining whether an individual is a final policymaker:

> (1) [W]hether the official is meaningfully constrained "by policies not of that official's own making;" (2) whether the official's decisions are final – i.e., are they subject to any meaningful review; and (3) whether the policy decision purportedly made by the official is within the realm of the official's grant of authority.

Randle v. City of Aurora, 69 F.3d 441, 448 (10th Cir. 1995). The Court notes that the City Charter provides police officers a right to appeal to the Civil Service Board any adverse employment action taken by the Chief of Police. See Tulsa Rev. Charter, Art. X, §§ 8.1 - 8.4. Further, City ordinances specifically place the Police Department under the "control and authority of the Mayor who shall approve rules and regulations defining the authority, specifying the duties, and governing the conduct of all police offers and employees of the Department." 29 Tulsa Rev. Ordinances, Ch. 1 § 101. In fact, the record suggests that the mayor exercised his

statutory authority and interceded on behalf of Plaintiffs by ordering the District Attorneys Office to conduct an investigation of their complaints and temporarily transferring Plaintiffs to his office during the course of the investigation. The City ordinances also provide:

> SECTION 106. POWERS OF CHIEF
>
> The Chief of Police shall have general supervision of the Department, and shall be accountable to the Mayor for the promulgation of all orders or regulations made or given to the Department. Every member of the Police Department shall respect and obey all orders issued by the Chief. It shall be the duty of the Chief to confer fully with and be advised by the Mayor on all important matters pertaining to the government of the Department.

Id. At § 106. Applying the test enunciated by the Tenth Circuit to the facts of the instant case, the Court concludes that Chief Diamond was not a final policymaker for the City because City ordinances constrained his authority and his employment decisions were subject to "meaningful review."

Plaintiffs concede that the police chief's authority "may be over-ridden by the Mayor or City Commission." Pls.' Resp. Br. at 5. Relying upon Flanagan v. Munger, 890 F.2d 1557 (10th Cir. 1989), however, they contend that "a Police Chief, given 'general supervision'[3] over the Police Department (even though his

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[3] 'Plaintiff's assert that Flanagan "clearly holds" that a police chief's general supervisory powers render him a final policymaker. Pls.' Resp. Bf. at 7. The Court notes that while Chief Diamond exercised "general supervision" over the Tulsa Police Department, the police chief in Flanagan had "direct

supervision can be overruled by the Mayor) is to be considered the 'final policymaker' under the Monnel [sic] test." Pls.' Resp. Bf. at 7. The Court concludes that Flanagan is clearly distinguishable from the instant case. In Flanagan, the police chief issued reprimands to police officers who owned a video store which rented allegedly pornographic videos. The Tenth Circuit held:

> We note at the outset that the City admitted that [a]t all times pertinent hereto, the City of Colorado Springs has delegated to [Chief Munger} final authority to issue reprimands to Colorado Springs police officers." This admission effectively disposes of the municipal liability issue because it all but flatly states that Chief Munger was the final policymaker with respect to issuing written reprimands in the department.

890 F.2d at 1568. Further, the City of Colorado Springs admitted that "there is no provision for administrative review of written reprimands in the City's procedural manual." Id. At 1569. The Tenth Circuit thus concluded that "for all intents and purposes, the Chief's discipline decisions are final, and any meaningful administrative review is illusory." Id. To the contrary, the Court has determined that Chief Diamond's personnel decisions were subject to meaningful review. Thus, even if Chief Diamond engaged in a course of action that deprived Plaintiffs of their constitutional rights[4], he was not acting as a final policymaker for

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management and supervision over the department." Flanagan v. Munger, 890 F.2d 1557, 1568 (10th Cir. 1989). Therefore, Flanagan clearly does not support Plaintiffs' assertion.

[4] The record indicates that Chief Diamond did not reprimand, suspend, or terminate Plaintiffs. Rather, Plaintiffs base their Section 1983 claim on Chief Diamond's alleged threats and intimidations. Because Chief Diamond was not a final policymaker for the City, the Court need not determine

the City and the City cannot be held liable under Section 1983 for those actions.

III.

Defendant Kusler. Although her response to that motion was due on March 29, 1996, Defendant Kusler has yet to file a response or a request for extension of time to respond. 1996, Defendant Kusler has yet to file a response or a request for extension of time to respond. Local Rule 7.1 (C) provides as follows:

> Response briefs shall be filed within fifteen days after the filing of the motion. Failure to timely respond will authorize the Court, in its discretion, to deem the matter confessed, and enter the relief requested.

Upon a review of the record and the brief of Plaintiffs, the Court hereby deems the matter confessed and holds that summary judgment in favor of Plaintiffs on Defendant Kusler's counterclaim is appropriate.

Accordingly, the City's Motion for Summary Judgment (Docket #172) is hereby granted, and Plaintiffs' Motion for Summary Judgment on Defendant Kusler's counterclaims is hereby granted (Docket #181).

IT IS SO ORDERED.
This _28th_ day of May, 1996.

Sven Erik Holmes
United States District Judge

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whether Plaintiffs have sufficiently alleged the deprivation of a constitutional right.